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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 374

THE PEOPLE OF THE STATE OF NEW YORK,
PETITIONERS,

vs.

MARK M. MACLAY AND CHARLES E. McWILLIAMS,
RECEIVERS OF McWILLIAMS BROS., INC., AND
UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 17, 1932

CERTIORARI GRANTED OCTOBER 24, 1932

(37,071)

(37,071)

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from district court of the United States, Southern New York	1	1
Notice of appeal	1	1
Petition for appeal	3	2
Stipulation waiving bond	5	3
Allowance of appeal	5	3
Assignments of error	6	3
Citation on appeal (omitted in printing)	10	
Notice of motion for order determining amounts and validity of claims, etc	12	6
Affidavit of Mark W. Maclay	14	6
Stipulation as to facts	19	9
Order settling priority of claims, etc	23	12

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	Original	Print
Opinion, Coxe, J.	32	18
Order appealed from	33	19
Stipulation as to contents of record	36	21
Stipulation as to correctness of record	38	21
Clerk's certificate (omitted in printing)	39	
Proceedings in United States circuit court of appeals, second circuit	40	22
Opinion, Hand, J.	40	23
Decree	44	28
Clerk's certificate (omitted in printing)	46	
Order allowing certiorari	47	29

[fols. a & 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity. E 40-20

North River Coal & Wharf Co., Complainant,

against

McWilliams Bros., Inc., Defendant

Notice of Appeal

Sirs: Please take notice that the People of the State of New York hereby appeal from the Order made herein on the 16th day of March, 1931, holding that the claims of the People of the State of New York for franchise taxes due from the defendant McWilliams Bros. Inc., in total $3,131.05, were subordinate to the claims of the United States of America and were not entitled to priority in payment to said claims of the United States of America and were not entitled to ratable payment with the claims of the United States of America, from the funds in the hands of the receivers in this action. This appeal is taken from each and every part of said order, insofar as the same relates to the determination of the question of the relative priorities [fol. 2] to be accorded between the claims of the People of the State of New York and the claims of the United States of America.

Dated April 4, 1931.

Yours, etc., John J. Bennett, Jr., Attorney-General of the State of New York, Solicitor for Petitioner-Appellant, People of the State of New York, Capitol, Albany, New York.

To Kobbe, Thatcher, Frederick & Hoar, Esqs., Solicitors for Receivers for McWilliams Bros. Inc., 128 Broadway, Borough of Manhattan, City of New York; Hon. George Z. Medalie, United States Attorney, Post Office Building, Borough of Manhattan.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

To the Honorable Judges of the United States District Court for the Southern District of New York:

Your petitioner, The People of the State of New York, conceiving itself aggrieved by the certain order entered on the 16th day of March, 1931, in the above entitled proceeding, which said order determined that the claims of the United States of America, totaling the principal sum of $34,180.43 with interest, and specifically stated in Subdivision C of paragraph number 1 of said order, were payable in priority to the claims of the State of New York allowed herein, in the aggregate amount of $3,131.05 with interest, and further providing that if the funds in the hands of the receiver remaining after the payment of the amounts specified in said order should not be sufficient to pay said claims of the United States in full, said remaining funds should be applied by the receivers to the ratable payment of the said claims of the United States of America, hereby petitions for [fol. 4] an appeal from the said order to the United States Circuit Court of Appeals for the Second Circuit and prays that its appeal may be allowed and that a citation may be granted directed to the receivers and trustees and other persons interested in this proceeding, demanding them to appear before the United States Circuit Court of Appeals for the Second Circuit, to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record and evidence in said cause, duly authenticated, may be transmitted to the said United States Circuit Court of Appeals for the Second Circuit and, in connection with this petition, the said petitioner, The People of the State of New York herewith presents its assignment of errors.

Dated New York, March 18, 1931.

John J. Bennett, Jr., Attorney-General of the State of New York, Solicitor for Petitioner, The People of the State of New York. Office & Post Office address: Capitol, Albany, New York.

[fol. 5] IN UNITED STATES DISTRICT COURT

STIPULATION WAIVING BOND

The undersigned, solicitors for the receivers of the above named defendant, and the appellee, the United States Attorney for the Southern District of New York, hereby waive the giving of a bond for costs by the appellant, The People of the State of New York, in connection with the foregoing petition for appeal.

Kobbe, Thacher, Frederick & Hoar, Solicitors for Receiver. George C. Medalie, United States Attorney, Southern District of New York.

IN UNITED STATES DISTRICT COURT

ALLOWANCE OF APPEAL

And now, to wit, this 28th day of March, A. D., 1931, upon reading and considering the foregoing petition, it is, upon motion of John J. Bennett, Jr., Esq., Attorney General of the State of New York, Solicitor for Appellant,

Ordered by the Court that the foregoing appeal be and hereby is allowed, and the solicitors for the receivers herein waiving the giving of a bond for costs by appellant, no order as to bond is made.

William Bondy, United States District Judge.

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Now come the People of the State of New York, petitioner-appellant, and file this, its Assignment of Errors, and in connection with its petition of appeal say that in the record of proceedings and in an order made and entered herein on the 16th day of March, 1931, manifest error hath intervened to the prejudice of the appellant, to wit:

First. That the Court erred in determining that the claims of the United States of America specified and set forth in subdivision C of Paragraph 1 of the Order ap-

pealed from, constituting three items, as follows: to wit, the amount of $516.46 with interest at 6% from August 14, 1926 to date of payment, the amount of $5,263.24 with interest from April 13, 1923 to the date of payment at the rate of 1% per month, the amount of $28,400.73 with interest from November 13, 1925 to the date of payment at the rate of 1% per month, were each and entirely payable by the receivers herein in priority to the claims of the People of the State of New York amounting to the aggregate sum [fol. 7] of $3,131.05 with interest at the rate of 6% upon the respective items thereof from the respective dates of accrual to the date of payment, whereas in law and fact, said claims of the People of the State of New York were payable in priority to the said claims of the United States of America, said priority of the People of the State of New York arising from the inheritance by the State of New York of the common law sovereign right of priority possessed by the Crown of England, a right which was not surrendered or ceded to the United States of America, under and pursuant to the constitution of the United States of America or any of the amendments thereof. And that the Congress of the United States of America had no constitutional right to pass any law or laws which would in any manner, shape, or form, prejudice or interfere with the assertion of the sovereign right of priority possessed by the State of New York, in the payment of taxes and other indebtedness due said State.

Second. That the Court erred in determining that the claims of the United States of America specified and set forth in paragraph "First" of this assignment of errors, were entitled to any priority over the claims filed by the People of the State of New York, in that the United States of America did not inherit or obtain the sovereign right of priority possessed by the Crown of England, but said right of priority was and is the exclusive right of the several states of the United States of America.

Third. The Court erred in determining that the claims of the United States of America specified and set forth in [fol. 8] paragraph "First" of these assignments of errors, were entitled to priority of the claims filed by the State of New York and on the ground that should it be determined that the United States of America had any priority

in the payment of its debts over general creditors and said United States of America had an equal priority with that possessed by the People of the State of New York, which the petitioner-appellant disputes, that then said priorities are in the same class of preferences and if the estate of the defendant is not enough to pay the several claims of the United States of America and the People of the State of New York in full, that the balance of the estate should be pro-rated between the United States of America and the People of the State of New York in the proportion that the balance of the estate in the hands of the receivers bears to the total amount of the respective claims of the United States of America and the People of the State of New York.

Wherefore your appellants pray that the order of the United States District Court for the Southern District of New York, granting to the United States of America the priority in the payment of its claims over the claims of the People of the State of New York as specified in said order be reversed, with costs. That it be determined that the claims of the State of New York for taxes aggregating $3,131.05 with interest is a preferred claim payable in priority to the claims of the United States of America, or, if it should be determined by the Court that the United States [fol. 9] of America has a priority equal to that possessed by the State of New York, that it be determined by the Court that the respective preferences of the United States of America and the People of the State of New York are equal in degree and, in the event of a deficiency of assets to pay the several claims in full, that the balance of the estate of the defendant be ordered pro-rated among the United States of America and the People of the State of New York, in accordance with the ratio that said balance of the estate bears to the total claims of the said United States of America, and the People of the State of New York, and that the cause be remitted to the United States District Court for the Southern District of New York for such further proceeding as may be in conformity with Justice and Equity.

Dated New York, March 18, 1931.

John J. Bennett, Jr., Attorney-General of the State of New York, Solicitor for Appellant, The People of the State of New York. Office & Post Office address: Capitol, Albany, New York.

[fols. 10 & 11] Citation, in usual form, omitted in printing.

[fol. 12] In United States District Court

[Title omitted]

Notice of Motion for Order Determining Amounts and Validity of Claims, etc.

Sirs: Please take notice that upon the annexed affidavit of Mark W. Maclay, verified January 10, 1931, and on all of the proceedings heretofore had herein, a motion will be made at Room 235, Post Office Building, Borough of Manhattan, City of New York, on the 23rd day of January, 1931, at 10:30 A. M., for an order determining the amounts and validity of the claims described in the annexed affidavit and the rights, if any, of said claimants to priorities in distribution, and for an order disallowing each of said claims, [fol. 13] and for such other and further relief as the justice of the cause may require.

Dated New York, January 9, 1931.

Yours, etc., Kobbe, Thatcher, Frederick & Hoar, Solicitors for Receivers of McWilliams Bros., Inc., 128 Broadway, New York City.

To the United States Attorney, Post Office Building, New York City; Hon. John J. Bennett, Jr., Attorney-General of the State of New York, 51 Chambers Street, New York City.

[fol. 14] In United States District Court

[Title omitted]

Affidavit of Mark W. Maclay—Verified January 10, 1931

State of New York,
County of New York, ss:

Mark W. Maclay, being duly sworn, says:

1. I am one of the receivers of McWilliams Bros., Inc., the defendant above named.

2. On or about January 20, 1927, the United States Government filed its claim herein for additional income taxes as follows:

Nature of tax	Year of taxable period ended	Amount of tax	Together with interest at 1% per mo. until paid. Interest began
Add'l Income Tax	1/1/17-7/13/17 Wash. Feb.424B-1923 List	$5,263.24	April 13, 1923
Add'l Income Tax	1918 Sept.590101-1926 List Trans. from 3rd N. Y.	28,400.73	Nov. 13, 1925
		$33,663.97	

3. On or about March 19, 1927, the United States Government filed its claim herein in the sum of $516.46 for [fol. 15] alleged expenses incurred by the Light House Service on July 13, 1926, in connection with replacing Dredged Channel Buoy No. 4, Bridgeport Harbor, Connecticut, which it was alleged was run into by the tug Chal McWilliams, with tow, belonging to McWilliams Bros., Inc., and lost.

4. On each of the foregoing claims the United States of America claimed to be entitled to preference and priority of payment under Section 3466 of the Revised Statutes and demanded that said claims be paid prior to other debts or liabilities of McWilliams Bros., Inc.

5. On or about September 16, 1927, the State of New York, through its Department of Taxation and Finance, made claim for said taxes under Sections 182 and 184 of the Tax Law as follows:

File No. 424606—1921 (Section 184) tax	$39.93
File No. 439031—1922 (Section 184) tax	653.27
File No. 456850—1923 (Section 184) tax	914.77
File No. 479436—1924 (Section 184) tax	208.85
File No. 504123—1925 (Section 182) tax	215.62
File No. 507497—1925 (Section 184) tax	285.38
	$2,317.82

On January 12, 1928, the State of New York gave notice to said receivers of an unliquidated claim for franchise taxes against the defendant for the years 1925, 1926 and 1927, and subsequent years, pursuant to the provisions of Section 182 of Article Nine of the Tax Law, until the termination of these proceedings; also taxes upon the gross

earnings pursuant to the provisions of Section 184 of Article Nine of the Tax Law for the years ending June 30, 1926 and June 30, 1927, and for all subsequent years or [fol. 16] parts thereof to the date of termination of these proceedings, the exact amount of such taxes and interest being alleged to be unknown at the date of said notice.

Subsequently, and under date of January 5, 1929, the State of New York mailed to said receivers the following liquidated claim for taxes, in addition to taxes for which claims were submitted under date of September 16, 1927:

Tax law	For tax year beginning	Interest at 6% per annum to date of payment from	Amount
	Franchise Taxes		
Sec. 182.			
Article 9	Jan. 1, 1926.....	March 15, 1926.....	$208.22
" "	Jan. 1, 1927.....	March 15, 1927.....	173.11
" "	Jan. 1, 1928.....	March 15, 1928.....	99.37
" "	Jan. 1, 1929.....	March 15, 1929.....	10.00
	Gross Earnings Taxes for Each Year Ending June 30		
Sec. 184.			
Article 9	1926	August 15, 1926.....	193.64
" "	1927	August 15, 1927.....	103.96
" "	1928	August 15, 1928.....	24.93
			$813.23

The receivers understand that this claim is a liquidated statement of the unliquidated claim filed on January 12, 1928.

Priorities and liens are claimed for the foregoing State taxes alleged to be due as franchise taxes and taxes on gross earnings.

6. It is the opinion of the receivers and their counsel that the said claims are invalid in whole or in part and that the same should be disallowed in whole or in part.

[fol. 17] 7. In an order in this action made by Honorable Thomas D. Thacher, District Judge, dated May 24, 1929, and entered in the office of the Clerk of this Court on May 24, 1929, it was provided as follows:

"(6) Before any further distribution is made by the Receivers from the moneys or the proceeds of the United States Treasury notes on deposit in their general account, the claims of the United States Government and of the State of New York set forth in article Sixth of the petition, and

more particularly described in the affidavit of Karl T. Frederick verified January 15, 1929, shall be brought on for hearing before this Court, or before a special master, to be appointed by this Court, on application to be made by the Receivers, to determine the amounts and validity of said claims, or either of them, and the rights, if any, of said claimants to priorities in distribution of the remaining moneys in the Receivers' general account."

8. That the claims described herein in paragraphs 2, 3, 4 and 5 are the same claims described in the affidavit of Karl T. Frederick, verified January 15, 1929, referred to in the said order.

9. No previous application for the relief herein sought has been made.

Wherefore the receivers herein request that the amounts and validity of the said claims and the rights, if any, of said claiman's to priorities in distribution of assets be deter-
[fol. 18] mined, that the said claims, and each of them, be disallowed, and for such other and further relief as may be just in the premises.

Mark W. Maclay.

Sworn to before me January 10, 1931. Commission expires March 30, 1931. Elsie M. Martin, Notary Public, Bronx Co., No. 113. Certificate filed in N. Y. & Kings Counties. N. Y. Co. No. 445, Kings Co. No. 44. N. Y. Reg. No. 1M321, Kings Reg. No. 1222, Bronx Reg. No. 3161.

[fol. 19] In United States District Court

[Titled omitted]

Stipulation as to Facts

The receivers of McWilliams Bros., Inc., the above named defendant, heretofore and on January 12, 1931, served upon the United States Attorney for the Southern District of New York a notice of motion with attached affidavit seeking an order determining the amount and validity of certain

claims heretofore filed in this proceeding by the United States and described in the said affidavit dated January 10, 1931, attached to said notice of motion. The attorneys for the receiver and for the United States hereby stipulate and agree that the facts hereinafter set forth relating to the said claims of the United States are true:

1. By order of this Court, dated January 10, 1927, Mark W. Maclay and Charles E. McWilliams were duly appointed temporary receivers of the defendant above named in an action duly instituted in this court for the conservation of the assets of the said defendant on behalf of its creditors. Such receivers duly qualified and have ever since been and still are such receivers.

[fol. 20] 2. By a further order and decree of this court, dated on or about January 29, 1927, said receivership was made permanent. By said orders and decrees creditors of the above defendant were required to file their claims herein.

3. On or about March 24, 1927, the United States filed a claim herein in the amount of $516.46 claiming that the defendant is indebted to the United States in said amount for expenses incurred by the Lighthouse Service in connection with replacing dredged Channel Buoy No. 4, Bridgeport Harbor, Connecticut, which was run into by the Tug Chal McWilliams with tow belonging to the defendant and lost. The receivers have examined said claim and believe it to be a just and proper claim against the said defendant in the amount stated. The United States asserts the right to priority in payment thereof pursuant to the provisions of Section 3466 of the Revised Statutes and also asserts that it is entitled to interest thereon at the rate of 6% from August 14, 1926, the date when formal bill was rendered to the defendant by the Lighthouse Service to the date of payment, whenever such payment shall be made by the receivers. The receivers are in doubt as to the right of the United States to such priority of payment as well as to its right to receive interest subsequent to January 10, 1927, the date of the appointment of the receivers herein.

4. On or about January 25, 1927, the United States filed a claim herein for additional income tax under the Revenue Act of 1916 for the period January 1, 1917 to July 13, 1917, in the amount of $5,263.24.

[fol. 21] McWilliams Bros., Inc., the above defendant, was organized under the laws of the State of New York and commenced business on or about July 14, 1917. It succeeded a partnership known as McWilliams Brothers and took over all of the assets and liabilities of such partnership. The above assessment was made for additional income taxes claimed to be due on the part of said partnership.

The assessment of the said tax was made March 8, 1923.

The assessment includes a penalty, the amount of the tax without penalty being $4,409.80.

The United States claims interest at 1% per month from April 13, 1923, to date of payment of said claim by the receivers and also claims priority in payment under Section 3466 of the Revised Statutes and by virtue of the sovereignty of the United States.

The original return of McWilliams Brothers (the partnership) was filed on October 14, 1922.

McWilliams Brothers (the partnership) never signed any waiver or extension of time within which to assess or collect said assessment.

No proceedings by way of suit, restraint or otherwise were ever commenced or prosecuted by the United States for the collection of said tax other than by way of the filing of said claim herein on January 25, 1927.

5. On or about January 25, 1927, the United States filed a claim herein for additional income tax under the Revenue Act of 1918 for the calendar year 1918 in the amount of $28,400.73.

Said assessment was made for additional income taxes claimed to be due on the part of the above defendant.

[fol. 22] The return for the year 1918 was filed by the above defendant on June 16, 1919.

The assessment of said tax was made on or about September 15, 1925.

The United States claims interest at 1% per month from November 13, 1925, to date of payment of said claim by the receivers and also claims priority in payment under Section 3466 of the Revised Statutes and by virtue of the sovereignty of the United States.

No proceedings by way of suit, restraint or otherwise were ever commenced or prosecuted by the United States

for the collection of said tax other than by way of the filing of said claim herein on January 25, 1927.

On or about February 14, 1924, the defendant signed a waiver which was later signed by the Commissioner, a photostatic copy of which is attached hereto.

On or about June 2, 1924, the defendant signed a waiver which was later signed by the Commissioner, a photostatic copy of which is attached hereto.

On or about April 20, 1925, the defendant signed a waiver which was later signed by the Commissioner, a photostatic copy of which is attached hereto.

No other waivers relating to said tax are on file or exist so far as the parties are aware.

6. The State of New York stipulates that the claims of the United States are valid in the amounts stated therein.

7. The United States stipulates that the claim of the State of New York is valid in the amounts stated therein.

[fol. 23] 8. The only question as between the United States and the State of New York is with respect to their relative rights to priority in payment.

Dated New York, February 10, 1931.

Kobbe, Thatcher, Frederick & Hoar, Attorneys for Receivers. Robert E. Manley, Acting United States Attorney. John J. Bennett, Jr., Attorney-General, State of New York.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTLING PRIORITY OF CLAIMS, ETC.—May 24, 1929

A motion having duly come on for hearing before me on January 10, 1929, and for further hearing before me on [fol. 24] May 16, 1929, for an order settling the priorities of certain creditors, fixing allowances, directing a distribution of moneys in the special account of the Receivers of the above named defendant, instructing said Receivers respecting the claims of preferred and general creditors, and approving said Receivers' ad interim accounting, as

more particularly set forth at length in the notice of said motion and the petition and report annexed thereto of Mark W. Maclay and Charles E. McWilliams, as said Receivers, verified December 7, 1929,

Now, on due notice of said motion and said petition and report annexed thereto, with proof of due service thereof upon the claimants or the solicitors for claimants named in said petition as asserting liens and priorities on and to the proceeds of said moneys held by said Receivers in their special account; on said petition and report; on the affidavits of Karl T. Frederick, verified January 7, 1929, and January 15, 1929, the affidavit of Mark W. Maclay, verified January 11, 1929, the affidavits of W. W. Miller and A. C. Downing, each verified January 9, 1929, the affidavit of Albert H. Ely, Jr., verified May 20, 1929, and the affidavit of Mark W. Maclay, verified May 16, 1929; and on all proceedings heretofore had herein; and after hearing counsel for the respective parties appearing in support of, in opposition to, or for modification of the order prayed for in said motion; and after due deliberation thereon, it is

[fol. 25] Ordered, adjudged and decreed that

(1) The moneys and proceeds of the United States Treasury notes in the special account of the Receivers, with interest earned thereon, are subject, in order of priority, to:

(a) The claims of Tracy Towing Line, Inc., and Roe Towing & Transportation Co., Inc., as set forth in article sixth of the petition, against the proceeds in special account, said claims being as follows for the amounts set opposite the names of each of the following barges:

Claim of Tracy Towing Line, Inc.:

Adelaide	$15
Egbert	93.25
Grace	5.65
Madeleine	8.76
Red Devil	35
Red Indian	68.15
Red Rose	15
Shirley	15
Victoria	15
Total	270.81

Claim of Roe Towing & Transportation Co., Inc.:

Adelaide	$168.20
Defender	78
Joseph	105
Mildred	87.20
Stuart	162.60
Red Rose	181.20
Victoria	127.30
Total	909.50

[fol. 26] (b) Allowances to the Receivers and to their counsel, Kobbe, Thatcher, Frederick & Hoar, for their respective services and disbursements in collecting and disbursing the moneys in special account, the same to be apportioned against proceeds of boats pro rata;

(c) The claim of The New York Trust Company, as Trustee, under a mortgage and supplemental mortgage to secure an issue of 5% First Mortgage Bonds, dated, respectively, July 12, 1917 and June 10, 1919 (hereinafter referred to as Mortgage No. 1), as against the proceeds realized by the Receivers on the sales of boats subject to Mortgage No. 1; and

(d) The claim of Charles E. McWilliams and Adolph Dexheimer, as Trustees for Kate McWilliams under a mortgage dated March 11, 1921 (hereinafter referred to as Mortgage No. 2) as against the proceeds realized by the Receivers on the sales of boats subject to Mortgage No. 2.

(2) The claims of the United States of America and of the State of New York set forth in article sixth of the petition and more particularly described in the affidavit of Karl T. Frederick, verified January 15, 1929, are not entitled to preferance or priority with respect to the moneys or United States Treasury notes in the Receivers' special account as against the claims and allowances hereinabove set forth in paragraph (1) of this order and listed thereunder as "a", "b", "c" and "d".

(3) The moneys and proceeds of United States Treasury [fol. 27] notes in the special account of the Receivers be distributed and paid over by the Receivers in the following order and manner:

(a) All interest paid by the depositary and/or earned on said Treasury notes be apportioned and added to the proceeds of the several vessels;

(b) Payment be made to Messrs. Macklin, Brown, Lenahan & Speer, as proctors for Tracy Towing Line, Inc., and for Roe Towing & Transportation Co., Inc., from the proceeds of the respective vessels, and in the principal amounts set forth in paragraph (1)-(a) of this order, with proportionate interest earned thereon by the Receivers;

(c) An allowance be paid to Charles E. McWilliams, as Receiver, in the sum of $5,000 00/100, Mark W. Maclay, as Receiver, in the sum of $5,000 00/100 and disbursements amounting to $47 69/100, or in all the sum of $5,047 69/100, and Kobbe, Thatcher, Frederick & Hoar, as solicitors for the Receivers, in the sum of $10,000 00/100 and disbursements amounting to $721 45/100 or in all the sum of $10,721 45/100 for their respective services rendered and disbursements paid at the request and with the consent of the mortgagees, and for their benefit and the benefit of all other preferred and general creditors in connection with the admiralty proceedings against all vessels mentioned in the mortgages and the recovery by them from the proceeds of the sales of said vessels in admiralty of the moneys and Treasury notes now on deposit in the Receivers' special account, said payments to each of the Receivers and to their counsel to be apportioned against proceeds of boats pro rata.

[fol. 28] (d) Three sixty-thirds (3/63) of the net remainder of the proceeds, with interest earned thereon, of vessels covered by Mortgage No. 1 as set forth in article fifth of the petition, not exceeding the sum of Three Thousand Dollars ($3,000) and accrued interest, be paid into the Registry of this Court, there to be held, subject to the claim, if any, of The New York Trust Company, as Trustee, and the claims of the holders, if they can be ascertained, of bonds numbered 74, 76 and 89 secured by Mortgage No. 1, or to the further order or orders of this Court.

(e) Sixty sixty-thirds (60/63) of the net remainder of the proceeds of sale of vessels covered by Mortgage No. 1, with interest earned thereon, as set forth in article fifth of the petition (not exceeding the sum of Sixty Thousand Dol-

lars ($60,000) and accrued interest on the sixty (60) bonds hereinafter mentioned), be paid to The New York Trust Company, as Trustee under said mortgage, for the benefit of the holders of the sixty (60) remaining bonds said to be outstanding and distribution to each of said holders of the proportionate share he shall be entitled to receive under and pursuant to the provisions of said mortgage, on presentation of his bond for the endorsement thereon of a suitable legend satisfactory to and approved by the solicitors for the Receivers evidencing such payment; and in case any of said remaining sixty (60) bonds shall have been lost, mutilated or destroyed, or for any reason whatsoever cannot be produced within ninety (90) days from the date hereof, then and in that event the balance of the money re-
[fol. 29] maining in the possession of the Trustee undistributed shall be paid over by it to the Registry of this Court, subject to the further order or orders of this Court; and

(f) The net remainder of the proceeds, with interest earned thereon, of vessels covered by Mortgage No. 2 as set forth in article fifth of the petition, not exceeding the sum of Forty-five Thousand Dollars ($45,000) and accrued interest, be paid to Charles E. McWilliams and Adolph Dexheimer, as Trustees for Kate McWilliams under Mortgage No. 2.

(g) Any further sums which may remain after the payments above directed shall remain in such special account subject to the further order of this Court.

(4) Payment be made by the Receivers from the proceeds of the barge Red Giant now on deposit in their general account to Messrs. Macklin, Brown, Lenahan & Speer, as proctors for Tracy Towing Line, Inc., in the sum of $97.50, with interest earned thereon by the Receivers, as set forth in article sixth of the petition.

(5) Ad Interim allowances be paid by the Receivers from the moneys in their general account to Mark W. Maclay, as Receiver, in the sum of $1,500.00/100 and disbursements amounting to $73.41/100, or in all the sum of $1,573.41/100; to Charles E. McWilliams, as Receiver, in the sum of $1,500; and Kobbe, Thatcher, Frederick & Hoar, as solicitors for said Receivers, in the sum of $2,500 and

disbursements amounting to $(411).26/100, or in all the sum of $2,911.26/100, on account of their respective serv-
[fol. 30] ices rendered and disbursements paid since January 10, 1927 in all matters pertaining to the general administration of this estate, exclusive of their several services performed in collecting the moneys now in and about to be disbursed from the Receivers' special account.

(6) Before any further distribution is made by the Receivers from the moneys or the proceeds of the United States Treasury notes on deposit in their general account, the claims of the United States Government and of the State of New York set forth in article sixth of this petition, and more particularly described in the affidavit of Karl T. Frederick verified January 15, 1929, shall be brought on for hearing before this Court, or before a special master, to be appointed by this Court, on application to be made by the Receivers, to determine the amounts and validity of said claims, or either of them, and the rights, if any, of said claimants to priorities in distribution of the remaining moneys in the Receivers' general account.

(7) The 19 claims of former deckhands or barge masters, members of the crews of the tugboats, and former office employees of the defendant, amounting to $2,226.16 for wages (as set forth in Schedule "C" annexed to the petition) are just and meritorious claims and are allowed as general creditors' claims.

(8) The 71 claims of merchandise and other general creditors, amounting to $24,605.76 (as set forth in Schedule
[fol. 31] "D" annexed to the petition) are just and meritorious claims and are allowed as general creditors' claims.

(9) The 19 claims of maritime lienors, amounting to $23,061.88 (as set forth in Schedule "E" annexed to the petition) are just and meritorious claims and are allowed as general creditors' claims for any remainders proved by said claimants to be outstanding after the termination of such proceedings in admiralty as may now be pending, or have been determined by final decrees, in the United States District Courts for the Southern and Eastern Districts of New York.

(10) The 27 claims of maritime lienors, amounting with interest and costs to $20,583.26 (as set forth in Schedule

"F" annexed to the petition), having been fully paid, are disallowed and the Receivers are instructed to mark said claims paid and to cancel them of record.

(11) The 16 wage claims, amounting to $776.48 (as set forth in Schedule "G" annexed to the petition) having been paid pursuant to an order of this Court dated February 25, 1928, be marked paid by the Receivers and cancelled of record.

(12) The claims of all mortgagees set forth in article fourth of the petition for any balances not heretofore recovered in admiralty proceedings or not paid from the distribution of the moneys in special account as hereinabove provided are just and meritorious claims and are allowed as general creditors' claims for such balances as may be established by said mortgagees.

[fol. 32] (13) The 18 claims of general creditors, amounting to $85,117.84 (as set forth in Schedule "H" annexed to the petition) be referred to a master hereafter to be appointed by this Court on application to be made by the Receivers if any assets remain in the estate after the payment of administration expenses and payments to preferential creditors ordered and approved by this Court.

(14) The itemized statements of account (as set forth in Schedule "I" annexed to the petition) showing all receipts and disbursements made by the Receivers since their appointment are hereby ratified, confirmed and approved.

T. D. Thacher, U. S. D. J.

IN UNITED STATES DISTRICT COURT

In Equity. E-40-20

OPINION OF HON. ALFRED C. COXE, DISTRICT JUDGE

COXE, J.:

It is my understanding that all outstanding differences except the question of priority as between the State and the Federal Governments have been adjusted and that the figures are correctly stated in the stipulation submitted on the motion.

On the question of priority, I hold that the Federal Government has priority over the State. (County of Spokane, Washington, et al. vs. United States, 279 U. S. 80; Stover, et al. vs. Scotch Hills Coal Co., 4 Fed. (2nd) 748.)

An order may be submitted on notice disposing of the motion in line with the above.

March 25th, 1931.

[fol. 33] IN UNITED STATES DISTRICT COURT

In Equity. E-40-20

NORTH RIVER COAL & WHARF CO., Complainant,

against

McWILLIAMS BROS., INC., Defendant

ORDER APPEALED FROM—March 16, 1931

A motion having duly come on for hearing before me on February 10, 1931, for an order determining the amounts and validity of the claims of the United States and the State of New York herein and their respective priorities in distribution, together with the priority of certain employees of the defendant,

Now, upon the notice of motion made by the receivers herein, dated January 9, 1931, and the affidavit of Mark W. Maclay, verified January 10, 1931, attached thereto, with proof of due service thereof, and upon the petition and report of the receivers herein, dated December 7, 1928, heretofore filed herein, and upon the order of Honorable Thomas D. Thacher herein, dated May 24, 1929, and upon the stipulation of facts, dated February 10, 1931, filed herein, and upon all of the proceedings heretofore had and papers here-[fol. 34] tofore filed herein, and after hearing counsel for the respective parties appearing in support of, in opposition to or in modification of the order prayed for in said motion, and after due deliberation thereon,

Now, on motion of Kobbe, Thatcher, Frederick & Hoar, solicitors for the receivers of McWilliams Bros., Inc., the defendant herein, it is

Ordered, adjudged, and decreed

1. That the moneys in the general account of the receivers with interest earned thereon are subject in order of priority

(a) First, to allowances to the receivers and to their counsel for their respective services and disbursements herein as the same shall be hereafter determined by this Court.

(b) Second, to the nineteen claims of former deckhands, barge masters, members of crews and employees of the defendant amounting to $2,226.16, without interest, for wages earned immediately prior to the receivership and as set forth in Schedule C attached to the petition and report of the receivers herein, dated December 7, 1928.

(c) Third, to the claims of the United States as follows:

(1) In the amount of $516.46 with interest at 6% from August 14, 1926, to date of payment;

(2) In the amount of $5,263.24 with interest from April 13, 1923, to the date of payment at the rate of 1% per month;

[fol. 35] (3) In the amount of $28,400.73 with interest from November 13, 1925, to the date of payment at the rate of 1% per month.

In the event that the funds in the hands of the receivers remaining after the payment of the amounts described in subdivisions (a) and (b) of this paragraph shall not be sufficient to pay said claims of the United States in full, said remaining funds shall be applied by the receivers to the ratable payment of the said claims of the United States.

(d) Fourth, to the claims of the State of New York in the aggregate amount of $3,131.05, with interest at the rate of 6% per annum upon the respective items thereof from the respective dates of accrual to the date of payment.

2. That the receivers herein are hereby authorized in their discretion to pay the respective amounts of the claims referred to in paragraph 1(b) hereof without awaiting the final determination of the allowances and expenses referred to in paragraph 1(a) hereof.

Alfred C. Coxe, U. S. D. J.

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO CONTENTS OF RECORD

It is hereby stipulated and agreed by and between the solicitor for the appellants and the solicitors for the appellees above-named that pursuant to the Rules of the United States Circuit Court of Appeals for the Second Circuit the transcript of the record for the purpose of the appeal of the State of New York from the order made herein on the 16th day of March, 1931, shall contain the following:

Notice of Appeal.
Petition for Appeal.
[fol. 37] Stipulation Waiving Bond.
Allowance of Appeal.
Assignments of Error.
Citation on Appeal.
Notice of Motion to Settle Priorities.
Affidavit of Mark W. Maclay, verified Jan. 10, 1931.
Stipulation as to Facts.
Order of Hon. Thomas D. Thacher, dated May 24, 1929.
Opinion.
Order Appealed from, dated March 16, 1931.
Stipulation as to Contents of Record.
Stipulation as to Correctness of Record.
Clerk's Certificate.
Dated April 15, 1931.

John J. Bennett, Jr., Attorney-General of the State of New York, Solicitor for Claimants-Appellants.
Kobbe, Thatcher, Frederick & Hoar, Solicitors for Receivers for McWilliams Bros., Inc., Appellees.
George B. Medalie, United States Attorney, Solicitor for Appellee, United States of America.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO CORRECTNESS OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the United States District

Court for the Southern District of New York in the above entitled matter, as agreed upon by the parties.

Dated New York, April 15, 1931.

John J. Bennett, Jr., Attorney-General of the State of New York, Solicitor for Claimants-Appellants. Kobbe, Thatcher, Frederick & Hoar, Solicitors for Receivers for McWilliams Bros., Inc., Appellees. George B. Medalie, United States Attorney, Solicitor for Appellee, United States of America.

[fol. 39] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 40] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1931

No. 44

Argued May 12, 1932. Decided June 13, 1932

North River Coal & Wharf Company, Complainant,

v.

McWilliams Bros., Inc., Defendant

Ex Parte

The People of the State of New York, Appellant,

v.

Mark W. Maclay and Charles E. McWilliams, Receivers of McWilliams Bros., Inc., and United States of America, Appellees

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Augustus N. Hand, Circuit Judges

From an order entered in the above equity receivership granting priority to the United States in the payment of

income taxes and of a claim by it for damages over the claim of the state of New York for franchise and gross earnings taxes, the latter appeals. Affirmed.

John J. Bennett, Jr., Atty. Gen. (Charles A. Schneider and Robert P. Beyer, Deputy Asst. Attys. Gen., of counsel), for the People of State of New York.

George Z. Medalie, U. S. Atty., of New York City (George Z. Medalie, Samuel C. Coleman, and Harry G. Herman, all of New York City, of counsel), for appellee.

OPINION

AUGUSTUS N. HAND, Circuit Judge:

The question raised by this appeal is whether under section 3466 of the U. S. Revised Statutes (31 U. S. C. A. § 191) claims of the United States for unpaid income taxes and for damages are entitled to priority over claims of the state of New York for franchise taxes and taxes for gross earnings. The United States and the state of New York each presented its claims to receivers who had been appointed upon the filing of a creditors' bill alleging that the assets of McWilliams Bros., Inc., exceeded its liabilities and praying for the appointment of a receiver, and upon an answer admitting the allegations of the bill and joining in the prayer for relief. The District Court awarded priority to the United States.

The "consent receivership" in this case was in effect a "voluntary assignment." Under the decisions, the order appointing the receivers gave the United States priority over general creditors of the insolvent estate by virtue of section 3466 of the Revised Statutes. Price v. United States, 269 U. S. 492, 46 S. Ct. 180, 70 L. Ed. 373; United States v. Butterworth-Judson Corp., 269 U. S. 504, 46 S. Ct. 179, 70 L. Ed. 380. This priority attached when the receivers were appointed. United States v. Oklahoma, 261 U. S. at page 260, 43 S. Ct. 295, 67 L. Ed. 638. The question is whether section 3466 gives priority not only over the claims of general creditors, but over the claims of the state of New York for taxes, even though the taxes were liens upon the property of the insolvent at the time when the re- [fol. 41] ceivers were appointed. This section is in terms very sweeping. It provides that: Whenever any person in-

debted to the United States is insolvent * * * the debts due to the United States shall be first satisfied. * * *" The word "debts" has long been held to include taxes.

The state of New York relies upon the decision of the Supreme Court in Marshall v. New York, 254 U. S. 380, 41 S. Ct. 143, 65 L. Ed. 315, which gave the state, by virtue of its sovereign prerogative, a priority over the general creditors of an insolvent that had been placed in the hands of a receiver. It says that, as this prerogative right was never ceded to the federal government by the Constitution, it avails as much against the United States as against private creditors. But the right of the United States depends upon its delegated power under the Constitution (Const. art. 1, § 8, cl. 18) to pass all laws necessary for carrying into execution the express power to levy and collect taxes and duties. Price v. United States, 269 U. S. 492, 46 S. Ct. 180, 70 L. Ed. 373. It is consequently paramount whenever exercised by statute.

The question of the extent of the state's prerogative recently came before the Supreme Court in Spokane County, Wash., v. United States, 279 U. S. 80, 49 S. Ct. 321, 73 L. Ed. 621. There taxes had been assessed against the personal property of a corporation by two counties in the state of Washington and afterwards a receiver of its assets was appointed who sold the property and reduced it to cash. The Supreme Court of Washington (Exchange Nat. Bank of Spokane v. U. S., 147 Wash. 176, 265 P. 722, 62 A. L. R. 139), from which the appeal lay, had held that under the law of that state the liens of the counties for the taxes assessed before the receiver was appointed had not been made specific. After the appointment of the receivers, the Commissioner of Internal Revenue assessed income taxes against the corporation for years prior to the date of the receivership. The funds in the hands of the receiver were, as in the present case, insufficient to pay in full claims of the United States and those of the counties. The court, per Taft, C. J., held that the taxes due the United States were entitled to payment by the receiver in priority to claims for county taxes that were not supported by a specific lien acquired prior to the appointment of the receiver. But he expressly reserved the question as to whether the taxes due the United States would have had priority if liens therefor had been perfected under the laws of the state prior to the

receivership, and cited the decision of the Supreme Court of Washington in Wilberg v. Yakima County, 132 Wash. 219, 231 P. 931, 933, 41 A. L. R. 184, where it was held that, if a tax is to be collected from personal property, "it does not become a lien upon such property until it has been seized and distrained by the sheriff. * * *" He emphasized the broad scope of the taxing power of the United States, referred to the decisions of the Supreme Court in United States v. Fisher, 2 Cranch, 358, 2 L. Ed. 304, Field v. United States, 9 Pet. 182, 9 L. Ed. 94, Lane County v. Oregon, 7 Wall. 71, 19 L. Ed. 101, United States v. Snyder, 149 U. S. 210, 13 S. Ct. 846, 37 L. Ed. 705, and other cases, and, after discussing the authorities, went on to say (at page 93 of 279 U. S., 49 S. Ct. 321, 324):

"The foregoing citations certainly make it clear that the United States has power, in order to collect its taxes and its revenues and debts due it, to confer priority for them over those of the states."

Since the decision in Spokane County, Wash., v. United States there can be no doubt that the United States would be awarded priority here, unless the taxes due the state of New York can be regarded as supported by a sufficient lien to give them a preference over claims of the United States in spite of Rev. St. § 3466 (31 U. S. C. A. § 191).

Counsel for the state of New York attempt to distinguish Spokane County, Wash., v. United States on the ground that section 197 of the New York Tax Law (Consol. Laws, c. 60) provides that a franchise or gross earnings tax "shall be a lien upon and bind all the real and personal property of the corporation * * * until the same is paid in full," whereas the statute of the state of Washington before the court in the Spokane Case was construed as imposing no effective lien prior to the taking of subsequent proceedings to enforce it. But section 197, as it read when the New York taxes in the case at bar became payable, did not specify when the tax lien would arise, and section 201 provided that, upon the issue of a warrant by the tax commission commanding the sheriff to levy and sell the real and personal property of the taxpayer for delinquent taxes, "such warrant shall be a lien upon and shall bind the real and personal property of the * * * corporation against

[fol. 42] which it is issued, from the time an actual levy shall be made by virtue thereof." It might have seemed to result from these two sections (when read together) that the lien for state taxes only arises when a levy is made by the sheriff. But in New York Terminal Co. v. Gaus, 205 N. Y. 588, 98 N. E. 1109, a majority of the New York Court of Appeals held that section 197 imposed a lien for taxes which was superior to a mortgage. It is true that when New York Terminal Co. v. Gaus was decided section 197 provided that the taxes should "be a lien upon and bind all the real and personal property" of the corporation "from the time when it is payable until the same is paid in full," and that by amendment subsequent to that decision section 197 was changed so that the words "from the time it is payable" were omitted. Thus, when the franchise and gross earnings tax now before us accrued, section 197 had ceased to contain the words "from the time it is payable," and only provided that such a tax should be a lien "until the same is paid in full." Accordingly it might have been argued that by the amendment, words in section 197 stating when the lien was to arise had purposely been omitted so as to leave section 201 to define the time. But the difficulty with this is that a similar contention was made in Carey v. Keith, Inc., 250 N. Y. at page 219, 164 N. E. 912, and the Court of Appeals there held that such an omission did not affect the time when the lien arose.

While it is clear that in the present case the taxes due the state of New York prior to the receivership were a general lien upon the real and personal property of the defendant at the time when the receivers were appointed, the question is not whether these taxes are statutory liens of some sort, but whether they are such liens as the courts of the United States have recognized as entitled to priority over claims due the government.

The Supreme Court appears to have given priority to the government under section 3466 or similar statutes in all cases except where the legal title of the taxpayer has been in some measure divested before the tax or other indebtedness became due. In Thelusson v. Smith, 2 Wheat. 396, 4 L. Ed. 271, debts due the United States were given precedence over the lien of a judgment-creditor who had not levied an execution against the property of the debtor.

Justice Washington said, at page 426 of 2 Wheat., 4 L. Ed. 271:

"If * * * before the right of preference has accrued to the United States, the debtor has made a bona fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a fi. fa., the property is divested out of the debtor, and cannot be made liable to the United States. A judgment gives to the judgment creditor a lien on the debtor's lands, and a preference over all subsequent judgment creditors. But the act of congress defeats this preference in favour of the United States, in the cases specified in the 65th section of the act of 1799."

At common law a real estate mortgage gave the mortgagee title subject only to an equity of redemption, and a chattel mortgage divested the mortgagor's title in the same way. The Supreme Court accordingly treated the title as no longer in the estate of the mortgagor, and gave government taxes priority only over interests in the equity of redemption. Conard v. Atlantic Ins. Co., 1 Pet. 386, 7 L. Ed. 189; Brent v. Bank of Washington, 10 Pet. 596, 9 L. Ed. 547. It was apparently this view of the divesting of the legal title that led the Supreme Court to subordinate government taxes to mortgages in days when the legal title was generally regarded as in the mortgagee. It was reiterated by Justice Gray in Savings Society v. Multnomah County, 169 U. S. at page 428, 18 S. Ct. 392, 395, 42 L. Ed. 803, where he said:

"This court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land as will defeat the priority given to the United States by act of congress in the distribution of the debtor's estate. * * *"

In view of the sweeping provisions of Rev. St. § 3466 (31 U. S. C. A. § 191, it seems unlikely that it was intended to allow the mere statutory declaration by a state of a general lien to give the latter a preference over debts and taxes due the government. Neither the decisions of the Supreme Court nor the specified priorities allowed third parties under Rev. St. § 3186 as amended (26 U. S. C. A. § 115)

indicate that section 3466 is subject to any such limitation. We hold that the court below properly awarded priority to the United States.

The state contends that a portion of the franchise and gross earnings taxes, amounting to $238.26, which accrued after the appointment of the receivers, should be given [fol. 43] priority as an expense of administration of the insolvent estate. In McGregor v. Johnson (C. C. A.) 39 F. (2d) 574, we allowed taxes on land accruing after the appointment of the receivers as a part of such administration expenses, but we did not pass on whether franchise taxes accruing during the receivership should be so treated. This question was not raised by the assignments of error which only claim priority of the taxes as a whole by virtue of the state's sovereignty. We accordingly shall not review the decision of the trial court as to this matter. See Spokane County, Wash., v. United States, 279 U. S. at page 85, 49 S. Ct. 321, 73 L. Ed. 621.

The order is affirmed.

[fol. 44] In United States Circuit Court of Appeals, Second Circuit

North River Coal & Wharf Company, Plaintiff,

vs.

McWilliams, Bros., Inc., Defendant; People of the State of New York, Appellant

Decree—Filed June 20, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 45] [File endorsement omitted.]

[fol. 46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 24, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,071. U. S. Circuit Court of Appeals, Second Circuit. Term No. 374. The People of the State of New York, petitioners, vs. Mark M. Maclay and Charles E. McWilliams, receivers of McWilliams Bros., Inc., and United States of America. Petition for a writ of certiorari and exhibit thereto. Filed September 17, 1932. File No. 37,071.